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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 185

C. C. THOMAS, Petitioner,

v.

YOUNGSTOWN SHEET AND TUBE COMPANY; WEBB & KNAPP, INC.; MURPH'S EXPRESS, a partnership; E. T. CRESSMAN; PETER B. TAYLOR; RICE'S FOOD STORE; and DAWSON, NAGEL, SHERMAN & HOWARD, Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

The Respondent, Webb & Knapp, Inc., respectfully requests this Honorable Court deny the Petition for Writ of Certiorari for the reasons hereinafter set forth.

II. QUESTION PRESENTED

The Petitioner in his answer to an involuntary bankruptcy petition had requested that a jury determine

III. DECISION OF THE DISTRICT COURT AND CIRCUIT COURT OF APPEALS

right is not a constitutional one as counsel seem to think. It does not appear to be within the scope of the Seventh Amendment which guarantees a jury trial "in suits at common law where the value in controversy shall exceed twenty dollars." The bankruptcy proceedings is statutory in character and thus the right arises from the act itself. See Section 19 of the Bankruptcy Act, Title 11 U.S.C. Section 42. It is [illegible]

"But the record before us contains no statement that the parties agreed to submit the case to the court, nor any express statement that they waived a jury at all. The language of the judgment is "this case came up for trial . . ."

"Is this court at liberty to infer from the entry of a waiver of the right to jury trial? When we consider the cases already cited, in which such a waiver has been implied, and that the right to have a jury when a party demands it, is so universally known and perpetual, we think [illegible]

"In the case of In re Baker, 13 F.2d 119 (1926), the Ninth Circuit considered the same question, and quoted with approval the following:

"We think parties should not be permitted to play fast and loose with the courts in a manner like the present, or in a reasonable construction under the rules, that effect should be given for the first time in appellate court to the contention of the party in the trial court. We think [illegible] [illegible] [illegible]

"Ordered, Adjudged And Decreed that the determinations and judgments of the Referee shall be, and they are hereby approved and affirmed."

* * * * *

The United States Circuit Court of Appeals for the Tenth Circuit on February 17, 1961 affirmed the decision of the District Court. A copy of the Circuit Court's decision is set forth in Appendix A in the Petitioner's Brief on pages 9 and 10.

IV. STATEMENT

At a meeting of Counsel for all parties and the Referee which took place on February 9th 1961, the following Minute Order was issued by the Referee (R. 171):

"In re: Thomas No. 29017

Richard H. Shaw, Esq., Denver U.S. National Center, Denver 2, Colorado. Clayton H. Morrison, Esq., 1544 Elmira Street, Aurora 8, Colorado. Allen A. Thoreen, Esq., Majestic Building, Denver, Colorado. Gerald M. Quiat, Esq., First National Bank Bldg., Denver, Colorado. Mr. Peter B. Taylor, Meadow Brook Drive, Boulder, Colorado. Mr. E. T. Crossman, 2244 South Madison Street, Denver 10, Colorado. William P. Horan, Esq., Majestic Building, Denver 2, Colorado. Murph's Express, 1101 23rd Street, Denver 5, Colorado. Hoe's Coal Store, 2201 Kearney Street, Denver 7, Colorado.

Gentlemen: Please be advised that the order setting aside of this matter for hearing on March 7, and 8, 1961, have been vacated."

In lieu of said settings, please take notice and you are hereby notified, that at 9:30 A.M., April 5, 1962, in the Bankruptcy Court Room, Post Office Bldg., Denver, Colorado, and, if necessary, also at 9:30 A.M., April 6, 1962, in the same place, the Referee will hear all issues in this matter triable by the Referee, including determination preliminarily of the right of any party to proceed as a creditor or intervening creditor. *If it shall appear there are sufficient creditors or intervening creditors the hearing will then proceed on the merit with respect to the commission of the act of bankruptcy alleged in paragraph 7 of the original petition herein.* (Emphasis supplied.)

Yours very truly,
Benjamin C. Hilliard, Jr.
Chief Referee in Bankruptcy.

The Petitioner through his Counsel participated in the meeting which was the basis of the foregoing Minute Order.

As appears from the Record, at the hearing itself as follows, no objection was made by Counsel for the Petitioner to the hearing by the Referee on the Act of Bankruptcy (R. 110-111):

The Referee;

* * *

Now the time within which to prepare the findings and orders which I have just made will not expire until I have rendered a final decision on the matters remaining, which are within the jurisdiction of the Referee to determine.

It is therefore the order of the Referee that we proceed at this time with the testimony on the act of bankruptcy tendered by the amendment which was filed when?

Mr. Quiat: May we excuse a number of witnesses, if it please the Court?

The Referee: Just a moment, until I complete my order and you may do so.

The issue, if any, to be heard by the Referee is whether or not the alleged bankrupt committed the act of bankruptcy alleged in the amendment permitted by the order entered on March 27, 1962, and which has been adopted by the other petitioning creditors, the Referee has just found are competent to maintain this proceeding. Therefore, you may proceed now, Mr. Quiat, with your testimony on the act of bankruptcy.

Mr. Morrison: May it please the Court, --

The Referee: Yes, Mr. Morrison?

Mr. Morrison: I believe we were under an order to file our amended answer. If the Court please, counsel would like to enter a formal motion to dismiss the petition as amended on the grounds that the act of bankruptcy set forth in count six of said petition is plead insufficiently and that the respondent cannot answer and counsel is prepared to present oral argument or explanation of the law and facts in said motion.

The Referee: Let's be sure that we're talking about the same thing, Mr. Morrison. As I understand it, the remaining issue before the Court is that tend-

ered by the amendment of paragraph seven which was filed on March 27, 1962.

Mr. Morrison: Excuse me, sir, I stand corrected. I meant paragraph seven instead of paragraph six.

The Referee: And it is your position that paragraph seven amended is insufficient on its face?

Mr. Morrison: That is correct, sir.

The Referee: Very well. I'll hear you on that issue.

(Argument by Mr. Morrison.)

The Referee: And now on the record, the Referee has heard the oral motion of the adjudged bankrupt to dismiss the amended paragraph seven which was filed on March 27, 1962, which is also the subject of the second defense in the answer this day filed by Mr. Thomas; and being sufficiently advised in the premise, overrules the motion and the second defense.

You may proceed with your testimony, Mr. Quiat.

* * * *

The trial then proceeded without a jury on the question of the Act of Bankruptcy and the Referee found that the Petitioner had committed an Act of Bankruptcy.

With regard to this waiver of trial by jury, the Referee in his opinion states as follows (R. 25, 26):

* * *

Upon this state of the record the matter was on January 25, 1964, referred to the undersigned Referee (and generally, severally and concurrently to his colleague) . . . to take such further proceedings . . .

as are required and permitted by the said Bankruptcy Act . . . It is the opinion of the undersigned Referee that by this reference he was authorized and had jurisdiction to hear and determine all matters raised by the initiatory petition and the answer thereto excepting trial of the issue of insolvency, the latter issue being triable only by a Judge of the Court under Sections 1(20) and 19 of the Bankruptcy Act. *The matter has proceeded on these bases with the full understanding of and without objection by any of the parties who have appeared before the Referees since the reference.* (Emphasis supplied.)

V. ARGUMENT

Counsel had cited only one case to support his contention. That case is the case of *Elliott vs. Toeppner*, 187 U.S. 327, 23 S. Ct. 133, which he states is in conflict with the *Kearney vs. Case* case, 12 Wall. 275, 20 L.Ed. 395, which was cited by the United States District Court in the portion quoted.

There is no conflict between these cases. The matter of waiver of a jury trial was never even discussed in the *Elliott vs. Toeppner* case. There a jury trial was had on the question of the insolvency, which jury rendered a verdict of not guilty and as a result of the not guilty verdict the United States District Court entered a judgment that Toeppner was not a bankrupt and dismissed the petition. The matter was presented to the higher court and the question was has the higher court the right to redetermine the issues of fact. The Court held in an "appeal" that both matters of law and fact are examined and on a writ of error matters of law only. The matter should have

come up by writ of error and can only be reviewed for errors in instructions, the giving or refusal of instructions and the admission or rejection of evidence, all of which must appear by exceptions duly taken and preserved by bill of exceptions. This case is not in point on the question of waiver of a jury trial.

VI. CONCLUSION

As is stated before, the matter is still pending in the United States District Court for the District of Colorado for a jury trial on the question of insolvency. Clearly counsel waived a jury trial on the matter of the Act of Bankruptcy. The decision of the Referee has been affirmed by the United States District Court and the Circuit Court of Appeals and it is respectfully urged that there is no reason for granting a writ of certiorari in this particular case.

Respectfully submitted.

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Webb & Knapp, Inc.